

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ELMAR K. SCOTT,

Petitioner,

v.

COVELLO,

Respondent.

Case No. 1:20-cv-01297-EPG-HC

FINDINGS AND RECOMMENDATION TO
DENY PETITIONER'S APPLICATION TO
PROCEED IN FORMA PAUPERIS

(ECF No. 2)

ORDER DIRECTING CLERK OF COURT
TO ASSIGN DISTRICT JUDGE

Petitioner Elmar K. Scott is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On August 24, 2020, Petitioner commenced the instant proceeding by filing a petition for writ of habeas corpus in the Sacramento Division of the United States District Court for the Eastern District of California. (ECF No. 1). On September 11, 2020, the petition was transferred to this Court. (ECF No. 6). Currently before the Court is Petitioner's application to proceed *in forma pauperis*. (ECF No. 2).

28 U.S.C. § 1915(a)(1) permits a plaintiff to bring a civil action "without prepayment of fees or security thereof" if the plaintiff submits a financial affidavit that demonstrates the plaintiff "is unable to pay such fees or give security therefor." A prisoner seeking to bring a civil action must, in addition to filing an affidavit, "submit a certified copy of the trust fund account statement . . . for the 6-month period immediately preceding the filing of the complaint . . .

obtained from the appropriate official of each prison at which the prisoner is or was confined.”
28 U.S.C. § 1915(a)(2).

Here, Petitioner has filed an application declaring that, due to his poverty, he is unable to pre-pay the full amount of fees and costs for these proceedings or give security therefor, and that he believes that he is entitled to the relief sought in his petition. (ECF No. 2). The California Department of Corrections and Rehabilitation submitted a certified copy of Petitioner’s inmate trust account statement showing the activity in Petitioner’s account for the previous six months. (ECF No. 4).

Petitioner’s certified inmate account statement indicates that he currently has an available sum of \$308.73 on account to his credit at Mule Creek State Prison. (ECF No. 4). Further, during the past six months, the average monthly balance of Petitioner’s account and the average monthly deposits to Petitioner’s account reflect that he is financially able to pre-pay the entire \$5.00 filing fee to commence this action and have money left over.

Should Petitioner have additional information to provide the Court, or should his available balance change by the time he receives this order, he may notify the Court. However, the Court has the authority to consider any reasons and circumstances for any change in Petitioner’s available assets and funds. See Alexander v. Carson Adult High Sch., 9 F.3d 1448, 1449 (9th Cir. 1993) (“If the plaintiff has depleted a previously adequate account and cannot pay the [filing] fee, the court may require the plaintiff to justify the depletion.”); Collier v. Tatum, 722 F.2d 653, 656 (11th Cir. 1983) (district court may consider an unexplained decrease in an inmate’s trust account, or whether an inmate’s account has been depleted intentionally to avoid court costs).

RECOMMENDATION & ORDER

Based on the foregoing, the undersigned HEREBY RECOMMENDS that Petitioner’s application to proceed *in forma pauperis* (ECF No. 2) be DENIED. If Petitioner wishes to proceed with this action, he must pre-pay the \$5.00 filing fee in full.¹

¹ If Petitioner pays the \$5.00 filing fee before the objection period closes, the Court will vacate the findings and recommendation and proceed with the case.

1 Further, the Clerk of Court is DIRECTED to randomly ASSIGN a District Court Judge to
2 the present matter.

3 This Findings and Recommendation is submitted to the assigned United States District
4 Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local
5 Rules of Practice for the United States District Court, Eastern District of California. Within
6 **TWENTY-ONE (21) days** after service of the Findings and Recommendation, Petitioner may
7 file written objections with the court and serve a copy on all parties. Such a document should be
8 captioned "Objections to Magistrate Judge's Findings and Recommendation." The assigned
9 District Judge will then review the Magistrate Judge's ruling pursuant to 28 U.S.C.
10 § 636(b)(1)(C). Petitioner is advised that failure to file objections within the specified time may
11 waive the right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d 834, 839
12 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

13
14 IT IS SO ORDERED.

15 Dated: **September 15, 2020**

16 /s/ Eric P. Grogg
UNITED STATES MAGISTRATE JUDGE